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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 183.

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

against

JAMES J. E. BURKE,

Respondent.

BRIEF FOR RESPONDENT.

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PRESS OF PRESCOTT PAPER, 80 Washington Street, New York City.

Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
against
JAMES J. E. BURKE,
Respondent.

BRIEF FOR RESPONDENT.

Statement of Facts.

The respondent desires to add the following to the statement of facts in the petitioner's brief:

1. This shipment at the time of its loss was in interstate commerce moving under a rate, tariff and classification duly filed and established by the defendant under the Interstate Commerce Act (Record, pages 3, 4, 20).

2. The filed rate under which this shipment was then moving was conditioned only upon the use of the Uniform Bill of Lading and not on any release of the amount of the carrier's liability (pages 20, 16, 13). The petitioner's tariffs gave the shipper but one option, i. e., to ship under the Uniform Bill of Lading or at common-law liability (page 13).

I.

The $100 limitation relied upon by the petitioner not a part of the petitioner's interstate tariff under which this shipment moved. It is therefore void and does not limit the petitioner's liability.

This shipment at the time of its loss was moving from San Francisco to New York. It was therefore, interstate commerce, and subject to the provisions of the Interstate Commerce Act.

The rights and liabilities of the parties in the present action must therefore be determined exclusively from the terms of the filed tariff and classification applicable to the rate under which this shipment moved.

First: As to the bill of lading issued in Japan (Exhibit A, pages 7-8) which contains the limitation clause on which the petitioner relies, that bill of lading was not filed by the petitioner as a part of its interstate tariffs. It is therefore inoperative and void so far as this loss is concerned.

Second: The filed rate under which this shipment moved ($1.25 per hundred pounds) is conditioned upon the use of the Uniform Bill of Lading only. The Uniform Bill of Lading therefore becomes the sole bill of lading covering this shipment at the time of its loss. It contains no limitation on the amount of the petitioner's liability except the clause limiting recovery to the invoice price, the amount herein sued for.

Third: The shipment was moving under a duly filed and established rate of $1.25 per hundred

pounds (page 20). The tariffs which, by reason of this rate and the provisions of the Interstate Commerce Act thereby became applicable to this shipment, are set forth in the record (pages 10-20). In none of them is the $100 clause of the ocean bill of lading set forth and none of them show any provision in any way limiting the amount of the petitioner's liability except the tariff provision that had the shipment been valued at more than $900 or more per 40 cubic feet (which it was not) a higher rate would apply and the provision of the Uniform Bill of Lading (page 15) limiting the carrier's liability to the invoice price of the shipment, the very amount sued for in this action. Neither of these limitations are material in the present case.

As the $100 limitation upon which petitioner relies was not a part of the rate and tariff under which this shipment moved at the time of its loss, it follows that it is inapplicable to the present loss and illegal and void and that the amount of respondent's recovery is not in any way limited thereby.

The decisions of this Court are clear that under the Interstate Commerce Act, the filed tariffs must show not only the charge for the services performed but also all regulations which in any way affect the value of the services performed for the charge named.

> Southern Pacific Ry. vs. Prescott, 240 U. S., 632.

Interstate Commerce Act. Sec. 6.

Nothing can be presumed. If a tariff does not expressly provide for a limitation of the value of a shipment, an attempted valuation is void.

The limitation is not permitted merely because the tariff is silent. Thus in Chicago & Alton Ry. vs. Kirby, 225 U. S., 155 an agreement to expedite a shipment although valid at common-law, was held void by this Court because the tariff did not specify such an agreement although it did not in terms forbid it.

II.

The $100 limitation of the bill of lading issued in Japan is not a "value agreed upon" valid under the Interstate Commerce Act.

The petitioner argues that the $100 limitation clause of the bill of lading issued in Japan is enforcible as a "value agreed upon" within the clause of the Uniform Bill of Lading limiting the carrier's liability to the invoice price unless a lower value "has been agreed upon or is determined by the classification or tariffs upon which the rate is based."

In other words, the petitioner contends that section 3 of the Uniform Bill of Lading permits a shipper and a carrier to validly agree upon a valuation for a shipment less than its real value, notwithstanding as we have seen above that the filed tariff and rate under which the shipment moved contained no such limitation.

This construction of the Uniform Bill of Lading is contrary to the whole scheme of the Interstate Commerce Act.

As we have shown under Point I, the Interstate Commerce Act required the carrier to state in a

definite way in its filed schedules everything which in any way affected the value of the services to be performed by it for the rate named. This would include a definite statement by the carrier, in its filed schedule, of the amount of liability to be assumed by the carrier, otherwise it must be conclusively presumed to have agreed to carry shipments without any restriction on the amount of its liability for the shipments' loss.

Having stated in a definite way in its filed tariff, the terms upon which it will perform a service, the Act, as shown by many decisions of this Court, requires that the carrier's responsibility shall be that which it has voluntarily assumed and set forth in its tariff.

If section 3 of the Uniform Bill of Lading is held to permit agreements as to value to be freely entered into by both shipper and carrier although not specified in the tariffs, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the commission. To permit such oral agreements would defeat the primary purpose of the Interstate Commerce Act, so often affirmed in the decisions of this Court which are to require equal treatment of all shippers and the charging of but one rate to all, and that rate the one filed as required by the act (See Atchison Topeka & Santa Fe Ry. vs. Robinson, 233 U. S., 173). The whole scheme of the Interstate Commerce Act requires that for the same rate all parties shall receive from the carriers the same terms, i. e., the regulations named in the filed tariffs and no others.

If the petitioner's contention were sound—that the 3rd paragraph of the Uniform Bill of Lading

permits any and all agreements as to value—then the carriers would have once more acquired absolute freedom in the matter of agreements as to values of shipments and the door would then be open to all the abuses of discriminations and secret agreements which the amended Interstate Commerce Act, was intended to cure. Under such a construction, the favorite large shipper would be sure to get a higher valuation than the small shipper.

Therefore, the "lower value agreed upon" referred to in the Uniform Bill of Lading must be construed to mean a "lower value agreed upon" as *provided by the classification or tariffs upon which the rate is based* and must refer to what is generally known as a "declared value."

This construction of the provision of the Uniform Bill of Lading is confirmed by the provisions of the Western Classification (page 11) which governed the tariff and rate under which this shipment moved (page 16), which Classification (Record, page 11) specifically sets forth that the ratings on certain articles in the Classification are conditions upon "declared" valuations, e. g., household goods, live stock, etc.

As the $100 limitation claimed by plaintiff was not filed in petitioner's schedules it cannot be enforced as a "lower value agreed upon."

It might be added that the provision of the Uniform Bill of Lading gains no immunity from attack by being itself a part of a filed tariff.

Boston & Maine R. R. vs. Piper, 246 U S., 439;

Chicago Milwaukee & St. Paul Ry. vs. McCaull, Dinsmore Co., 251 U. S., 549.

III.

Even if the $100 limitation of the Japanese Bill of Lading be called a "value agreed upon" within the meaning of the uniform bill of lading, nevertheless the $100 limitation would still be void and unenforcible because it is not supported by a difference in freight rates based upon the valuation declared.

Admitting for argument that the $100 limitation of the bill of lading issued in Japan constituted a "lower value agreed upon" by the parties within the meaning of Section 3 of the Uniform Bill of Lading, nevertheless, the clause purporting to limit defendant's liability to $100 per package would be void because it would lack the one absolutely essential element to its validity under all the decisions of the Federal courts, i. e., the freight charge made was not based upon the valuation so declared.

Only one rate was filed and offered by the defendant, i. e., $1.25 per hundred. Whether the shipper at San Francisco had said "my shipment is valued at $500 per package" or "my shipment is valued at $10 per package" defendant's charge could only have been $1.25 per hundred. It was the only legal rate.

The Interstate Commerce Act in no way invalidated the common law rule that a limited liability to be valid must be based upon a difference in the carrier's rates. It only added the additional element that this difference must appear in the filed rates and the provision for the valuation to be valid must appear in the carrier's filed schedules.

Adams Express Co. vs. Croninger, 226 U. S., 491.

It is a fixed requirement of all the Federal decisions that an "agreed valuation" to be valid must be supported by a freight rate based upon it, or in other words, the shipper must have obtained a lower freight rate in consideration of agreeing to the limited valuation of his shipment.

This thought runs through all the Federal decisions. Thus in the leading case of Hart vs. Penn. R. R. Co., 112 U. S., 331, this Court stated the basis of its holding as follows:

> "The distinct ground of our decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in the case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives and of protecting himself against extravagant and fanciful valuation."

In Adams Express Co. vs. Croninger, 226 U. S., 491, its first valuation decision under the Carmack Amendment, this Court said:

> "It has therefore become an established rule of the common law as declared by this Court

> In many cases, that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage, to an agreed value *made for the purpose of obtaining the lower of two or more rates*, or charges proportioned to the amount of the risk." • • •
>
> "Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value *for the purpose of adjusting the rate* conflict with any sound principal of public policy. *The reason for the legality of such agreements is well stated in Hart* vs. *Penn. R. R. Co.*, 112 U. S., 331." (Our italics.)

The most recent case is Boston & Maine R. R. vs. Piper, 246 U. S., 439, where the Court, by Mr. Justice Day, summed up its holdings in the various cases as follows:

> "In the cases in which the recovery for the lesser valuation has been affirmed, the shipper was offered an opportunity to recover a greater sum than the declared value upon paying a higher rate to the carrier. The shipper was offered alternative recoveries based upon different valuations upon the payment of different rates, and was held bound by the one chosen."

In the Kensington, 183 U. S., 263, the question involved was the right of an ocean steamer to limit

its liability for the passenger's baggage to 250 francs. The shipping ticket provided that passengers could not increase the amount of the carrier's liability above 250 francs except upon conditions which this Court held were illegal. This Court, in an opinion by Mr. Justice (now Chief Justice) White, refused to limit the passenger's recovery, saying:

> "We think the arbitrary limitation of 250 francs to each passenger unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment is void."

And so we find through all the decisions of this Court, the distinct requirement that the charges made must be based on the valuation fixed by the bill of lading, or, in other words, it must be shown (1) that the shipper, by declaring the lower value, obtained a lower rate than the carrier would have been legally entitled to charge if the shipper had declared the true value of his property, and (2) that the carrier would have been legally entitled to make a higher charge if the shipper had declared the full value of his property.

Applying this well established principle to this present case, it will be seen that the $100 limitation of the Japanese bill of lading is, so far as this interstate transportation is concerned, absolutely void and unenforcible, because as there was but one legal rate, i. e., the filed rate of $1.25 per hundred, the shipper did not, and could not, have obtained a lower charge by declaring a value of $100 per package, and the carrier could not have made

or obtained a higher charge if the shipper had declared the full value of his property.

There was only one filed rate, and no machinery was provided whereby the shipper could compel the carrier to accept a shipment at the shipper's own valuation.

In other words, there can be no claim of fraud, no basis for an estoppel, and there can be no consideration for any claim of a contract.

Nor can the limitation be upheld on any theory of waiver because neither the shipper or carrier can waive any provision of the filed tariffs, and there is no consideration for a waiver.

Nor can any fancied consideration be made out of the statement of defendant's tariffs that ten per cent. additional charge would be made unless the uniform bill of lading was used.

The basis of that additional charge of ten per cent. is the use or non-use of the uniform bill of lading, in other words whether the defendant is to carry at the common-law liability of an insurer or under the limited liability of the uniform bill of lading (record, page 13).

This additional charge of ten per cent. has nothing to do with the question of the valuation of a shipment, as will be seen if we assume two shipments, each made under the uniform bill of lading, both moving from San Francisco to New York, one at a valuation of $500 per package, the other at a valuation of $100 per package. In both cases defendant's charge would be, and would have to be, the same, $1.25 per hundred pounds.

IV.

The case of Reid vs. Fargo, 241 U. S., 544, in no way reversed or modified the previous holdings of the Court.

Petitioner's counsel in effect rests his entire case upon the case of Reid vs. Fargo, 241 U. S., 544, claiming that it is "an express adjudication that, by the law as administered in the Federal Courts an agreed valuation is valid and binding regardless of whether or not the freight rate is based upon the valuation agreed upon."

Counsel is mistaken. The Reid case is not authority for this proposition and in no way modified the previous decisions of this Court.

The Reid case involved an ocean shipment of an automobile moving from London to New York and was in no way subject to the Interstate Commerce Act, and the ocean carrier and the shipper were not as in the present case restricted by filed tariffs and were entirely free to enter into any agreement that they felt desirable.

The bill of lading in the Reid case specifically provided:

> "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100 or its equivalent in English currency, on which basis the freight is adjusted and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared and stated herein, and extra freight as may be agreed on paid."

And there was no proof in that case off-setting the express terms of the bill of lading, that an ex-

tra charge would be made, if an extra value was declared.

An examination of the record of the trial in that case shows that the only witness examined on this point was the general traffic agent of the American Express Company at London, who was not an official of the ocean carrier and who was merely testifying from his knowledge based upon his experience in dealing with ocean carriers. That he was not qualified to testify as to what the ocean carrier would have done had the full value of the automobile in question been declared was shown by his frank statement that "the value of an automobile is never furnished to a steamship line and in my experience they have never been notified of the value of an automobile shipped." As his whole testimony was based on his experience and by his own admission he had no experience, it will be seen that he was not qualified to testify that if the full value of the automobile had been declared the rate would have been the same and that "no extra freight would have been asked by the carrier" and as his testimony was the only evidence, there was no proof to offset the statement of the bill of lading that an additional charge would be made.

While it is true that he tried to testify that if the full value of the automobile had been declared, the rate would have been the same, that was true only, as he explained because there were two bases of freight, one on value and one on measurement, and the carrier always charged the higher of the two and the witness testified that in this instance the measurement rate would have exceeded the valuation rate.

On the question of difference in rates, a sheet of ocean freight rates was offered in evidence, and that

sheet specifically provided that "weight, cold storage, automobiles and ad valorem shipments must be specially arranged."

It may also be well to recall in this connection that the rate sheet of an ocean carrier is little more than an invitation to do business and has not the binding force of a filed interstate tariff. The ocean carrier except for business reasons is free to change its rates with each shipment and each shipper.

The limitation in the Reid case was undoubtedly upheld by this Court under the principle that where a bill of lading, duly delivered and accepted, declares as did that bill of lading that lawful alternate rates based on specified values were offered, such declaration is sufficient prima facie evidence of choice, to support the limitation.

Cincinnati, New Orleans & Texas Pacific Ry. Co. vs. Rankin, 241 U. S., 319.

In the present case we have definite and incontrovertible proof that no such difference of rates existed.

V.

The defendant could have inserted the limitation in its filed tariff.

The respondent plays for sympathy by erroneously stating that Yokohama, the original point of shipment was "the only point on the entire transit at which the shipper and the carriers could possibly make any agreements as to value" notwithstanding that the alleged agreement in the present

case was only a printed figure in a bill of lading.

Respondent's statement ignores the entire scheme of the Interstate Commerce Act which has provided machinery to meet just the situation presented by this shipment. The alleged value of $100 per package is only a *printed* figure on a bill of lading form. Under the Act, the defendant had only to play fair, and file as a part of its interstate tariffs a provision providing for a valuation of $100 per package and making provisions for higher rates proportioned to higher valuation and the courts would hold and have repeatedly held that the very act of shipping under that rate and tariff would constitute a valid agreement as to value even where no bill of lading had in fact been issued.

> Boston & Maine R. R. vs. Hooker, 233 U. S., 97.

When the carrier in making up its rate ignored in its tariff-provision any reference to value, it showed conclusively that the question of the value of the shipment made under that rate was one that it was not interested in at all and that it was prepared to carry shipments under that tariff entirely without reference to whether they were of greater value or of smaller value, and it is fair to assume that it fixed the amount of its charge with reference to any additional risk that that involved. It is therefore entirely illogical and unfair to allow a carrier who before the loss voluntarily went on record as willing to ignore the element of value of shipments to insist after the loss that it must have the benefit of a limitation as to value.

It can be confidently stated that any value placed on this shipment in the printed form of the unfiled

ocean bill of lading in no way influenced the petitioner with respect to the care which it gave this shipment. In fact there is no reason to believe that the petitioner even knew of the existence of this $100 clause in the ocean bill of lading until after this loss had occurred.

VI.

The natural place for provisions limiting the values of shipments is in the tariff.

The defendant further argues that it should have the benefit of the $100 provision of the ocean bill of lading because "the natural method of expressing such an agreement is in the bill of lading" and also urges that "agreed valuations are usually stated in the bill of lading either in the printed clauses or by an endorsement by rubber stamp or in handwriting."

The many decisions of this Court since the passage of the Carmack Amendment show that the "natural place" and the only place for an agreed valuation provision such as this is claimed to be is in the carrier's filed tariffs and that an endorsement on a bill of lading not in accordance with a filed tariff is absolutely void.

In the case of D'Utassy vs. Southern Pacific Co. 250 U. S., 639, this Court declined to review a decision of the New York Court of Appeals holding void a request endorsed on a bill of lading because the terms of that endorsement were not set forth in the carrier's tariff.

The whole scheme of the Interstate Commerce Act requires that valuation provisions be stated in the filed tariffs and not left to individual contracts and the "natural place" for such agreements is therefore in the tariff and nowhere else.

VII.

The judgment of the New York Court of Appeals should be affirmed.

All of which is respectfully submitted,

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